SUPREME COURT OF QUEENSLAND

CITATION:	*R v Dean; R v Murphy; R v Jaffe* [2017] QCA 276
PARTIES:	**In CA No 253 of 2016** **R** **v** **DEAN, William Francis** (applicant) **In CA No 255 of 2016** **R** **v** **MURPHY, Scott Stuart** (applicant) **In CA No 269 of 2016** **R** **v** **JAFFE, Stephen Daniel** (applicant)
FILE NO/S:	CA No 253 of 2016 CA No 255 of 2016 CA No 269 of 2016 DC No 490 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Applications
ORIGINATING COURT:	District Court at Southport – Date of Sentences: 16 September 2016 (Clare SC DCJ)
DELIVERED ON:	13 November 2017
DELIVERED AT:	Brisbane
HEARING DATE:	21 March 2017
JUDGES:	Fraser and Philippides JJA and Flanagan J
ORDERS:	**In CA No 253 of 2016** **The application is granted to the extent that the sentence on the count of extortion is set aside and in lieu thereof a sentence of five years is imposed and the parole eligibility date of 12 November 2018 is varied to 12 November 2017.** **In CA No 255 of 2016** **The application for leave to appeal against sentence is refused.** **In CA No 269 of 2016** **The application for leave to appeal against sentence is refused.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicants, Dean and Murphy, were sentenced following pleas of guilty to six years' imprisonment for extortion, five years' imprisonment for robbery in company, three years' imprisonment for each of two counts of deprivation of liberty and one count of assault occasioning bodily harm in company and two years' imprisonment for assault occasioning bodily harm – where the applicant, Jaffe, was sentenced following pleas of guilty to four years' imprisonment for robbery in company and two years' imprisonment for each of two counts of deprivation of liberty, one count of assault occasioning bodily harm in company and one count of assault occasioning bodily harm – where the complainant owed Murphy money and the offences were about recovery and retribution – where the applicant was taken to a remote location, tied up and made to walk through bush before being held in a large pipe for a protracted period – where a ratchet strap was tightened around the complainant's mouth – where the complainant was punched by the applicants – where the offences were for Murphy's benefit – where Murphy was a middle-aged man with a criminal record involving low level offending and had committed offences while on bail – where Dean procured others to commit offences and had taken amphetamine prior to his offending – where Dean was 37 years old with no criminal history – where Jaffe was 29 years old, suffered from mental illness and had a criminal record restricted to breaching reporting orders – whether the sentences were manifestly excessive

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – PARITY BETWEEN CO-OFFENDERS – where the sentencing judge found that there was no material distinction between the criminality of the applicants, Dean and Murphy – where Dean's presence was greater and his conduct more violent – where Murphy had planned for the involvement of others in the offences and had anticipated that force would be used against the complainant – where the offences were carried out for Murphy's benefit – where the applicant, Jaffe, contended that his criminality was below that of Dean and Murphy – where Jaffe did not have any contact with the complainant initially but was involved in punching the complainant and prevented the complainant from escaping – where Jaffe contended that his criminality was commensurate with the co-accused Sensoy's, who received a wholly suspended sentence – where Sensoy was younger and cooperated by entering an earlier plea – whether the sentences failed to achieve the necessary differential treatment of the

applicants' criminality

CRIMINAL LAW – SENTENCE – SENTENCING PROCEDURE – OTHER MATTERS – where the applicant, Dean, had served 342 days of non-declarable presentence custody while on remand for other offences – where that time was not brought to the sentencing judge's attention – whether the Court should reopen the sentence in respect of the non-declarable presentence custody

Green v The Queen (2011) 244 CLR 462; [2011] HCA 49, applied
Markarian v The Queen (2005) 228 CLR 357; [2005] HCA 25, applied
R v Cifuentes [2006] QCA 566, considered
R v Coleman [1995] QCA 549, considered
R v Drinkwater [2006] QCA 82, considered
R v El-Masri [2003] QCA 52, considered
R v Girardo & Michaelides [2012] QCA 166, considered
R v Granato [2006] QCA 25, cited
R v Houkamau [2016] QCA 328, applied
R v Main and Fauid [2012] QCA 80, cited
R v McGregor & Payne [2002] QCA 334, cited
R v Melano; Ex parte Attorney-General (Qld) [1995] 2 Qd R 186; [1994] QCA 523, cited
R v Miller [2015] QCA 94, considered
R v Omar [2012] QCA 23, considered
R v Salmon; Ex parte Attorney-General (Qld) [2002] QCA 262, cited
R v Taouk [2012] QCA 211, considered

COUNSEL: S R Lewis for the applicant, Dean
A J Kimmins for the applicants, Murphy and Jaffe
P J McCarthy for the respondent

SOLICITORS: Legal Aid Queensland for the applicant, Dean
Archbold Legal for the applicants, Murphy and Jaffe
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** I agree with the reasons for judgment of Philippides JA and the orders proposed by her Honour.

[2] **PHILIPPIDES JA:** The applicants seek leave to appeal against sentences imposed on 16 September 2016 on pleas of guilty entered on 30 August 2016 as follows.

[3] The applicant, Dean, was sentenced to concurrent sentences of:

- six years' imprisonment on count 4 (a count of extortion);
- five years' imprisonment on count 2 (a count of robbery in company);
- three years' imprisonment on each of counts 1 and 3 (counts of deprivation of liberty) and count 6 (a count of assault occasioning bodily harm in company); and

- two years' imprisonment on count 5 (a count of assault occasioning bodily harm).

A parole eligibility date of 12 November 2018 was imposed and a declaration was made that presentence custody of 106 days be deemed as time served under the sentences.

[4] The applicant, Murphy, was sentenced to concurrent sentences of:

- six years' imprisonment on count 4 (a count of extortion);
- five years' imprisonment on count 2 (a count of robbery in company);
- three years' imprisonment on each of counts 1 and 3 (counts of deprivation of liberty) and count 6 (a count of assault occasioning bodily harm in company); and
- two years' imprisonment on count 5 (a count of assault occasioning bodily).

A parole eligibility date of 12 February 2019 was imposed and a declaration was made that 62 days of presentence custody be deemed as time served.

[5] The applicant, Jaffe, was sentenced to concurrent sentences of:

- four years' imprisonment on count 2 (a count of robbery in company); and
- two years' imprisonment on each of counts 1 and 3 (counts of deprivation of liberty), count 5 (a count of assault occasioning bodily harm) and count 6 (a count of assault occasioning bodily harm in company).

A parole eligibility date of 28 December 2017 was imposed and a declaration was made as to presentence custody of 55 days as time served.

[6] Another co-offender, Sensoy, was also sentenced on 16 September 2016 but did not seek to appeal his sentences. He was convicted on his pleas entered in April 2016 in respect of counts on a separate indictment to concurrent sentences of:

- five years' imprisonment on one count of torture;
- four years' imprisonment on one count of robbery in company; and
- three years' imprisonment on one count of kidnapping.

Presentence custody of 724 days was declared time served and the sentences were suspended forthwith with an operational period of five years.

Sentencing remarks

[7] Her Honour set out the circumstances of the offending as follows:

> "The offenders pleaded guilty to robbery and other offences committed against [the complainant who] … had owed Murphy $2000. The offences were about recovery and retribution. Murphy had various business interests. The co-offenders were associates of his. Prior to the offences, Jaffe and Dean succeeded in taking possession of the complainant's car as security for the debt. The car was stored at an industrial shed owned by Murphy. The complainant later secretly retrieved it and went into hiding. The offenders tracked him down

> through his partner, Ms Davies, and she was used to set him up. She was made to summons him to a service station in a call for help.
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> When the complainant showed up, he realised it was a setup so he ran, eventually seeking protection inside the 7-Eleven shop. When that failed, he was forced into his own car where he was restrained and taken to a remote location. He was tied and made to walk through bush into a large pipe where he was held for a protracted period. A ratchet strap around his mouth was tightened. He was punched at different times by different offenders. He was told that he would be made to work for his debt and his car would be destroyed.
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> He was being taken out of the bush when a police patrol intervened. An alert had gone out, it seems, from the 7-Eleven store. Both Dean and the complainant were covered in dirt. Dean still had the ratchet strap. The complainant's face was bloodied and battered, he was plainly terrified – so much so that he declined to make a complaint that night. He continues to be afraid, suffering nightmares and depression. His mouth bares the scar of the ratchet."

[8] Her Honour observed that Murphy, Jaffe, the complainant and Ms Davies all have some history with drugs but there was no claim that drugs were a motivation for these offences. Her Honour described the offending as follows:

> "The offences amount to premeditated thuggery, with considerable effort towards serious violence for a modest amount of money. They were cold and calculated. They display a capacity for measured cruelty. Such conduct cannot be tolerated by a civilised society. It must be firmly denounced. Issues of community protection and deterrence are fundamental."

[9] Her Honour noted that all offenders had pleaded guilty to a fresh indictment on 30 August 2016 and that a submission had been made that the pleas should be acknowledged as early because they were entered immediately after the presentation of the indictment. However, her Honour found that, while there was utilitarian benefit, the pleas were not early pleas, having only been entered after the trial had started and in circumstances where there had been no prior offer to plead guilty to any offence. The sentencing judge set out the background to the pleas being entered:

> "The trial was listed to commence on the 29th of August [2016]. It was the second listing for trial. On the 29th of August, Murphy, Dean and Jaffe applied for a separate trial from Ms Davies. Before their application was argued, Ms Davies pleaded guilty, gave an undertaking to testify against them and was sentenced. The cooffenders were advised that Ms Davies was to be called as a witness. The following day, the three of them pleaded not guilty to all offences on the indictment and a jury was empanelled.
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> As a result of negotiations after the commencement of the trial, the prosecution substituted a fresh indictment with some reduced charges, most notably abandoning, torture and kidnapping for all three and the extortion in respect of Jaffe. All offenders have now pleaded guilty to robbery, the same charge to which they pleaded not

> guilty on the day the jury was empanelled. Dean and Murphy also pleaded guilty to extortion in the same terms as it appeared on the original indictment. In place of the original charges of torture and kidnapping, they have each pleaded guilty to two counts of assault occasioning bodily harm and deprivation of liberty. Two trial days were consumed in the process. The pleas of guilty saved perhaps another two to three days of court time. Murphy, Dean and Jaffe are entitled to credit for that, but not for remorse. This was a pragmatic acceptance of the weight of the prosecution evidence. For example, Mr Murphy, through his counsel, admitted no more than could be proved against him. He has offered no explanation or additional detail. His counsel could say no more of his client's conduct than what was evident from the prosecution witnesses. A similar situation appears for Dean and Jaffe."

[10] The sentencing judge then turned to consider the criminality of each offender, dealing firstly with Murphy:

> "Direct evidence of Murphy's involvement is limited to preparatory conduct at the beginning, and an assault and extortion in the last phase of the offending. From that, [counsel] contended Murphy's role was peripheral. However, the context of Murphy's conduct provides a better understanding of it. The complainant was targeted because he owed Murphy money. That is common ground. This whole exercise was for Murphy's benefit. There was no suggestion that anyone else had a separate interest in pursuing the complainant. Murphy planned for the involvement of three men. He entered into a plan with his co-accused to detain the complainant and to force him, through unlawful threats or violence, to repay the debt, or handover his car, or to perform work for Murphy. Murphy anticipated that his co-offenders would act together, that is, he expected the force of a number of men would be used against the complainant to take his car, or his money or make him work. An inference about the level of violence within Murphy's contemplation may be drawn from the nature of his participation at the beginning and the end.
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> The initial intimidation of Ms Davies was not the subject of a separate charge but it was the beginning of the execution of the group's unlawful plan. It exposed Murphy's understanding of the type of assistance he was likely to get from the people with whom he conspired. He went to Ms Davies with Dean and Jaffe. Ms Davies was young and small. She was confronted by the combined presence of three big men, all of them solidly built. The sizes of Murphy and Dean in particular would intensify the intimidation. There was a confrontation and interrogation. The allegation that Murphy 'raged in' was not disputed. That incident is the known beginning of the unlawful enterprise towards the offences.
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> Ms Davies tried to record the incident but the men took her phone. She was told that they would also take her child if she did not assist. [Counsel] has stressed that the Crown could not prove it was Murphy who made that threat, but at the very least there was tacit endorsement. Murphy did not disassociate himself from it in any

way. That shocking threat was made to force information about the complainant's whereabouts. The whole reason for finding the complainant was to recover money for Murphy. Murphy's presence and demeanour added credibility to the threat. There is no suggestion that he made any attempt then, or later, to moderate the approach of the others acting for his benefit.

On the day of the robbery, the co-offenders used Murphy's car but Murphy himself did not have any direct contact with the complainant until the last portion, after the complainant had been captured and held in the tunnel for an extended period. Murphy was a principal offender for the extortion, the assault occasioning bodily harm – that is count 6 – and the continued deprivation of liberty. His own conduct had disturbing undertones. By the time Murphy arrived, the group had already secured the complainant's car. The complainant had been beaten and tied. He was being held in this remote area. He was a prisoner of the giant Dean. It was late in the afternoon in autumn and it was getting dark in the tunnel. Those were the circumstances in which Murphy went to see the complainant. He showed no shock or alarm at what he saw.

Rather, he compounded the menace with a further assault and the extortion. He punched the complainant six times in the head while Dean held him tightly. The complainant was defenceless. It was purely gratuitous. Murphy told the complainant his car would be burnt and he would have to paint Murphy's house. That was not simply excessive force to recover what was owed, it was retribution. When the complainant was taken into the bush, he feared he would be killed. Murphy's behaviour could only have added to the complainant's intimidation. And that was the obvious objective.

The Crown abandoned the torture charge against Murphy, Dean and Jaffe, which means the court cannot attribute to them any intention to inflict severe psychological or physical suffering. That does not mean that the court must ignore the clear intention to inflict suffering that was substantial, albeit less than severe.

The expectation was that Dean would take the complainant to Murphy's house to begin painting that very day. Murphy left it to Dean to do. Murphy's approach is instructive for the hierarchy of the group. Dean was involved in all stages of the plan and the dominant actor in most of it but he proved to be a henchman for Murphy who came at the end to deliver his threatening message in person and then left the mechanics to Dean."

[11] Her Honour had regard to Murphy's antecedents and personal circumstances. He was a middle-aged man who had had some success in business. He had a criminal record and, while it indicated low level offending (with entries for an old assault and a weapons offence committed as a young man, some minor drug and dishonesty offences in 2008, a public nuisance in 2010 and then twice, while on bail, he was caught in relation to possession of dangerous drugs), it "could not be said that he was otherwise of good character". Her Honour noted counsel's submissions that, since his release on remand, his bail conditions had required "over the past two years or so, twice daily reporting conditions and a requirement that he remain in

those suburbs where he lived and worked". There were five recorded breaches of the bail conditions. Her Honour took into account that Murphy had had "some inconvenience whilst on bail but that is not such which could equate to any significant period of imprisonment".

[12] The sentencing judge made the following remarks concerning Dean's culpability:

> "Dean was involved in procuring Davies to assist in the capture of the complainant. He was part of the group for the first confrontation with Ms Davies. And he then returned with men to secure her for the setup. He was dominant at the 7-Eleven and in the detention of [the complainant]. Footage shows Dean's menacing presence around Ms Davies while they waited for the complainant's arrival. He then hid in the bushes, and fired up on methyl amphetamine before running at the complainant. He took the complainant's car keys. He was not deterred when the complainant got away and ran into the shop.
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> The complainant asked the attendant there for help and Dean mocked him. He asked for writing material so the complainant could there and then sign over his car. The attendant told them all to get outside. Dean forced the complainant out and carried him to the car. As he did so, the complainant screamed for the police. The attendant promised to call them. That did not deter the offenders. They were brazen and determined. Dean held the complainant down while Sensoy drove. They took him to the bush. They looked for a restraint and then Dean directed Sensoy to get the others. Dean was the one who walked the complainant through the bush, into the tunnel and when the complainant tried to run, he easily overpowered him and issued a warning.
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> He hinted that the group was responsible for the disappearance of another person. He wanted the complainant to be afraid and the complainant was afraid. He thought Dean would kill him. Dean kept him in the tunnel for at least an hour. Sensoy and Jaffe joined them in the tunnel, they blocked the exit and hit him while Dean tightened the ratchet around the complainant's mouth. It was cutting into his mouth and the complainant yelled in pain. He stopped yelling when Dean wrapped the cord around his neck to control him. Sensoy and Jaffe left, then Murphy arrived. It was then that Dean held him while Murphy punched. Dean ensured that the complainant could not move. After Murphy had secured the promise to paint his house, he left. Dean waited a further period before removing the binds and walking the complainant out."

[13] As to Dean's antecedents, the sentencing judge noted that his early life had held promise; he was the vice-captain of his school and went on to solid employment. However, things had become undone when he lost his job, returned to the Coast and began using amphetamine. He was 37 years old with no criminal history beyond low level drug offences, committed six months before the present offences and also two weeks after them. Dean's use of amphetamine immediately before the attack upon the complainant "may have escalated his conduct." However, he "chose to take that drug immediately before a premeditated attack" and it was not a mitigating feature. Dean had spent 90 days in custody and during that time went through

withdrawal. His family supported his rehabilitation. He had references which appeared to be written on the day he pleaded guilty. They spoke of the offences being out of character and claimed he was remorseful but gave no further explanation. Her Honour stated that bare assertions of remorse, without more, were unconvincing.

[14] The sentencing judge made the following remarks and findings concerning Jaffe's culpability:

> "He had the least direct involvement with the complainant but he played a pivotal part in setting the trap for him and he had some participation in the detention and assault. He twice went with others to pressure Ms Davies. He procured her to make the call to the complainant. He drove her and the others to intercept the complainant for the purpose of robbery and deprivation of liberty. Along the way he reminded Ms Davies that they would take her daughter if she did not help. Jaffe didn't get involved in chasing the complainant, but he was present and visible to the complainant at the service station. He stood in the adjacent car park until the complainant was caught and removed. After that Jaffe took Davies elsewhere before going with Sensoy to the tunnel where the complainant was held. Although he was there for a short period, he helped block the complainant's escape and he hit him in the head. He was present while Dean caused the distress with the ratchet tape."

[15] Her Honour noted that at the time of his offending, Jaffe was 29 and worked in Murphy's pizza shop. His criminal history was restricted to breaching reporting orders. A promising sporting future ended with injury and he fell into drug abuse at the age of 18, from which it was said he developed depression and anxiety. Dr Coran, a psychiatrist, saw Jaffe about a year or so after his arrest and again in March 2016. On the premise of a history of anxiety and depression, Dr Coran diagnosed an adjustment disorder with mixed anxiety and severe depressed mood and posttraumatic stress disorder. He concluded that Jaffe's current condition was a result of the combination of mistreatment in the watch-house on remand, by the stress of being prosecuted, by a strong sense of injustice because he claimed he was innocent and by an aggravation of the posttraumatic stress through daily reporting. As to those matters, her Honour observed that:

> "Jaffe had spent 40 days on remand including 20 days in the watch-house. The watch-house does involve more restrictive confinement than a correctional facility but there is no evidence of mistreatment during that time in the watch-house beyond hearsay in the report and submissions from the bar table. Jaffe's credibility is an issue because he had woven, for the benefit of Dr Coran, an account of innocence based on a detailed alibi. There is a letter from Jaffe's uncle referring to a history of anxiety and depression which the uncle thought was exacerbated by time in the watch-house. The uncle offered that Jaffe was in a fragile state and referred to regular psychological sessions in Melbourne post-release from the watch-house. I invited the defence to provide more information about pre-existing mental health issues and the circumstances of the watch-house detention, but nothing more was offered.

> *To constitute a mitigating or aggravating feature there must be some evidence of a relevant connection between the mental health issue and the purposes of sentencing. The defence submission is that relevant and significant matters about Jaffe's mental health are contained in Dr Coran's report and that those matters diminish the need for general and personal deterrence and lessen Mr Jaffe's moral culpability, even if there is no causal link with the offending. Generally, a reduction in moral culpability for an offence requires a causal link between the mental health problem and the commission of the offence. As explained by the High Court in Muldrock, paragraph 54*, evidence of a causal link may not be required for an intellectual impairment, which of itself suggests impaired reasoning, but a link is generally required for other cases of mental health conditions.
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> Here, not only is there an absence of a causal link, information about mental health issues at the time of the offending is light. He may also have been affected by his time on remand but that later reaction cannot reduce his moral culpability for the earlier criminal acts. The needs of specific and general deterrence may be reduced by a condition that emerged after the crime but the impact will depend upon the nature and severity of the symptoms and the effect on the mental capacity of the offender. Dr Coran reports that Jaffe's condition is now stable and responsive to treatment. He opined a need for assistance in coping with the perception of 'unjust situation, false charges against him and trauma done to him in custody'. It was only after that report was written that Jaffe admitted criminal involvement in serious offences. Consideration of Dr Coran's opinion must be tempered by that fact, and by the absence of evidence of mistreatment in the watch-house. No updated report has been provided. While some weight may be given to psychological issues, the material is not such as to remove considerations of community protection and denunciation."

[16] As to the relative culpability of the applicants, her Honour concluded:

> "On balance, I find no material distinction between the criminality of Murphy and Dean. Dean, perhaps, has slightly better history; but they are of similar age, and have similar mitigation in the plea of guilty. Sensoy and Jaffe are on a rung below; they were not party to the extortion. Sensoy had a broader involvement, and was party to the more serious offence of torture; but, at the same time, he was younger, and has the benefit of substantial co-operation. Jaffe has the psychological issue."

[17] For completeness, it should be noted that the sentencing judge made the following remarks in sentencing Sensoy:

> "Sensoy admitted deliberate and active involvement. He was a party to a plan to kidnap the complainant, to threaten and assault him and steal his car. He was not involved in the preliminary threat to Ms Davies but admitted going to her house soon after in pursuit of the unlawful plan. He stayed with her until Davies and Jaffe arrived to force her to

> call the complainant. Sensoy's role was subsidiary to that of Dean, but he energetically backed him up. He lay in wait at the service station for the complainant. He chased the complainant inside and then waited outside. He drove the complainant to the bush and later brought Jaffe to the tunnel. He was there for a short time in which he blocked the exit and punched the complainant in the head. He admitted that torture was a probable consequence of the plan to which he was a party. He delivered the complainant's car to Murphy's industrial property.
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> He is the only offender convicted of torture and kidnapping but he is also the only offender to cooperate with police and to enter early pleas of guilty. He did attempt to withdraw his guilty pleas after the prosecution accepted convictions for lesser offences in respect of the co-offenders. Sensoy's objective, however, was not to avoid responsibility but to have the benefit of a more lenient approach. His cooperation remains substantial and meaningful and warrants significant weight. At 19 he is the youngest of the offenders and he does have prospects for rehabilitation. The history records an assault, possession of weapons and breach of directions in 2013 for which minimal punishment was imposed. Sensoy remained in custody on remand for these offences for two years and the custody reports for that time are favourable."

Submissions on behalf of the applicant Dean

[18] On behalf of the applicant, Dean, it was contended that the sentences imposed were manifestly excessive, which included a submission that a period of 342 days of non-declarable presentence custody was not taken into account by the sentencing judge.

Submissions on behalf of the applicant Murphy

[19] The applicant, Murphy, raised the following grounds of complaint:

1. The sentences imposed were manifestly excessive.
2. The sentencing judge erred in the factual basis upon which the sentence proceeded.
3. Murphy had a justifiable sense of grievance when comparison is made to the disposition in sentencing of his co-accused.
4. The sentencing judge failed to give proper weight to named mitigating factors.
5. The sentencing judge erred in her approach to the declaration of presentence custody.

Submissions on behalf of the applicant Jaffe

[20] The applicant, Jaffe, sought leave to appeal against his sentences on the following grounds:

1. The sentences imposed were manifestly excessive.
2. The sentencing judge failed to give adequate weight to the report of Dr Corran.

3. The sentencing judge failed to give adequate weight to the applicant's plea of guilty.

4. The sentence imposed on the applicant in respect of the count of robbery gives rise to a justifiable sense of grievance when compared to the sentence imposed on the co-accused.

5. The sentence imposed fails to give proper regard to the relevant mitigating circumstances.

Comparative authorities

[21] At sentence, the prosecution submitted that the applicable range was one of four to six years' imprisonment with the less culpable offenders at the bottom of that range and the more culpable offenders at the top of that range. The respondent was unable to find any authorities directly on a par but referred the Court to *R v Girardo & Michaelides*[1] and *R v Miller*.[2]

[22] In contending before this Court that the head sentence of six years' imprisonment on the extortion count was manifestly excessive, Counsel referred to the following authorities.

[23] In *R v Drinkwater*,[3] a sentence was imposed after a trial, of six years' imprisonment for extortion with a 12 month concurrent term for wilful damage and attempted arson. Drinkwater had demanded $50,000 from the complainant, acting on behalf of the complainant's business associates. His conduct included putting petrol on the victim's car, throwing petrol bombs at the complainant's home and pouring diesel over his fence and threats directed at the complainant's daughter. No one, however, was injured and there was no serious property damage. The offender had a minor criminal record, a good work history and a record of community service. The contention that six years' imprisonment was at the very top of the range for extortion was rejected by the Court of Appeal, which referred to the seven years sentence imposed after trial in *R v Stratton*[4] and to the sentences of five years imposed on pleas in *R v Stokes*[5] and *R v Coleman*.[6] *Drinkwater* cannot be seen as indicating the upper end of an appropriate sentence after trial for extortion.

[24] In *Coleman*, as mentioned, a sentence of five years' imprisonment with parole eligibility recommended after two years, on a plea of guilty to extortion with a circumstance of aggravation, was not interfered with on appeal. The 41-year-old offender, who had previous convictions for serious offences, including armed robbery, was engaged by a bookmaker to collect $17,000 for a judgment debt owed by the complainant. He made repeated dire threats, including threatening to blow up the debtor's house and to shoot him and that he was a member of a gang. The Court emphasised that an adequately deterrent sentence had a special importance for conduct concerning extortion. It is to be observed that, although dire threats were made, the conduct did not involve the infliction of actual violence as occurred in respect of the extortion offence in the offending before this Court.

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1 [2012] QCA 166.
2 [2015] QCA 94.
3 [2006] QCA 82.
4 [1992] QCA 102.
5 [1993] QCA 467.
6 [1995] QCA 549.

[25] *R v El-Masri*[7] concerned two incidents involving a complainant who owed a drug debt to the offender. The first involved the deprivation of the complainant's liberty in a car and his being assaulted. The other incident concerned the offender being a party to assaults by two others of the complainant who was hit with an iron bar and a baseball bat, tied and blindfolded and struck several more times before being placing him in the boot of a car. Those two abductors threatened to shoot the complainant before taking him to El-Masri, who assaulted him, demanding to know how he would get his money. El-Masri had the complainant call his mother; he told her she had a limited time to get the money or her son would be dead. A sentence of five years' imprisonment was imposed for kidnapping for ransom and concurrent sentences of two terms of three years' imprisonment for deprivation of liberty and assault occasioning bodily harm committed. (The unexpired portion of an intensive correction order that was breached was also ordered to be served concurrently.) El-Masri had a troubled immigrant background and, unlike the present applicants, had the benefit of relative youth at 22 years of age.

[26] In *R v Omar*,[8] the offender pleaded to the offences of burglary with violence while armed and in company, kidnapping and assault occasioning bodily harm, for which concurrent sentences of four years' imprisonment and 18 months' imprisonment were imposed after trial. Presentence custody of 380 days was declared with parole fixed at the one third mark (16 months). Two co-offenders were sentenced to two and a half years for the first two offences and 12 months for the third (with a declaration as to 23 and 27 days served) and immediate parole. Omar was 21 and the co-offenders were 17 at the time of the offences. The youth of the offenders and the circumstances of that case do not render that it a useful comparative.

[27] In *Girardo*,[9] concurrent terms of imprisonment of four and a half years imposed on the offender Girardo after a trial for each of two counts of extortion were not interfered with by the Court of Appeal. Girardo, who had prior convictions for dishonesty offences, had procured others to carry out the extortion by making threats. *Girardo* did not however involve the infliction of actual physical violence on the victim.

[28] In *R v Taouk*,[10] leave to appeal against a sentence of three years' imprisonment, suspended after one year, imposed after Taouk pleaded guilty to one count of extortion was refused. The complainant was the offender's uncle who, the offender alleged, owed him money in relation to the development of an industrial unit complex. The offender recruited two others to demand payment of monies from the complainant. He was lured to an industrial complex, where he was kept for two hours. The complainant was threatened with death and threats of serious harm to his family were made. The complainant suffered significant psychiatric consequences. The offender had one previous conviction for a minor offence and there was an absence of genuine remorse. Taouk did not attend upon his victim in person. Nor, unlike the position in the present offending, was actual violence occasioned upon the complainant. Taouk had instructed that he did not want his victim harmed physically.[11]

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7 [2003] QCA 52.
8 [2012] QCA 23.
9 [2012] QCA 166.
10 [2012] QCA 211.
11 [2012] QCA 166 at [12].

[29] In *R v Cifuentes*,[12] an application for leave to appeal against a sentence of three and a half years' imprisonment was refused. The applicant was a police officer who threatened the complainant that, unless he paid him $15,000, the applicant or his "boss" would search the complainant's home, his parent's home, confiscate his assets and remove his children from his care and place them in the custody of the State. In imposing sentence, the sentencing judge remarked that, without mitigating circumstances such as the difficulties the applicant would face in prison as a result of his being a police officer, a sentence of about four and a half years' imprisonment would have been appropriate. Cifuentes had not shown actual remorse and his offences involved an abuse of his position as a police officer. The amounts involved were relatively modest and no violence was threatened. Jerrard JA (with whom the other members of the Court agreed) held[13] that the authorities showed that, given that the deterrent element was of particular importance for the offence of extortion, a prison sentence for extortion was difficult to avoid and that other matters tending to require the imposition of substantial sentences of imprisonment included:[14]

(a) the offender used violence to the victim, or damaged the victim's property;

(b) the offender threatened personal violence to the victim;

(c) the length of time over which the demands persisted;

(d) the extent of planning and organisation involved in the offence;

(e) the sum of money demanded from the victim;

(f) whether, as in this case, the offender abused a position of power or trust;

(g) whether the offender actually extracted money from the victim;

(h) whether the offender threatened to cause harm to other, quite innocent, people; and

(i) whether the offender preyed upon the habits or proclivities of others.

[30] Counsel for Murphy also referred to three vigilante cases: *R v Salmon; ex parte Attorney-General of Queensland*,[15] *R v McGregor and Payne*[16] and *R v Granato*.[17] I do not consider those cases of assistance, given the different nature of the offending, other than to observe that vigilantism is a factor considered by courts as warranting a deterrent sentence.

The application by Dean

The applicant's submissions

[31] In submissions, counsel for Dean relied in particular on the decision of *Drinkwater*,[18] where a sentence of six years was imposed after trial, as indicating that the appropriate starting point was a range of four to five years' imprisonment. Given that Dean was sentenced on the basis that he procured Davies to assist in detaining the complainant, his was heavy involvement in the taking of the complainant and restraining him, and then in placing the ratchet in the

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12 [2006] QCA 566.
13 *R v Cifuentes* [2006] QCA 566 at [29].
14 *R v Cifuentes* [2006] QCA 566 at [29].
15 [2002] QCA 262.
16 [2002] QCA 334.
17 [2006] QCA 25.
18 [2006] QCA 82.

complainant's mouth and tightening it during the assault. It was contended that a sentence towards the middle to upper end of that range was appropriate.

[32] As to the issue of the declaration, it was submitted that her Honour declared 106 day of presentence custody as time served under the sentences imposed, being 90 days from 8 April 2014 to 7 July 2014 and a further period of 16 days from 30 August 2016 to 15 September 2016. Counsel questioned the second period that was declared as the applicant was on remand for other offences in respect of that period. Further, the applicant had been on remand for murder and related offences from 4 October 2014, while he remained on bail for the present offences. His bail on the matters dealt with by the sentences judge was not revoked until 9 October 2015, leaving a period of 342 days for which the applicant was on remand for these offences and other matters. That time was not declarable and was not brought to her Honour's attention. It was submitted that it ought to have been taken into account. Relying on *R v Houkamau*,[19] it was submitted that the appropriate course in relation to the non-declarable time was to reduce both the head sentence and the parole eligibility date. No further order was sought in relation to the declared days.

The respondent's submissions

[33] The respondent accepted the contentions made on behalf of Dean in relation to the appropriate manner in which the sentences should be modified in relation to the period spent on remand that was unable to be declared. However, it was contended that that did not reflect appealable error.

[34] The sentence imposed of six years was not manifestly excessive and should the sentencing discretion be required to be re-exercised, the same sentence should be imposed. The process of sentencing was an exercise of sound sentencing discretion. The sentencing judge's sentencing discretion was extremely wide to be exercised within the limits of the principles which are applicable.[20] It necessarily involved the assessment of a variety of factors. The Courts have long recognised that it is not possible to say that a sentence of a particular duration is the only correct or appropriate penalty to the exclusion of any other penalty.[21]

[35] *Drinkwater*, *Cifuentes* and *Amery* did not provide an example of offending where actual violence was used in the execution of the extortion demands and factually bore little resemblance to the present matter. As for *El-Masri*, the respondent submitted that there a sentence of five years without further amelioration through earlier eligibility for parole was imposed for the offence of kidnapping for ransom. In that sense, it was submitted that the recognised amelioration for the plea was demonstrated through a reduced head sentence alone. It was submitted that the broad circumstances of the offending bore some semblance to the present matter in that El-Masri was not presently active in the kidnapping for ransom. It was submitted that it was pertinent that the maximum penalty for the kidnapping for ransom of 14 years, was also the maximum penalty for the offence of extortion.

[36] The sentencing judge was cognisant of the circumstances and timing of the entered plea. The sentencing judge was entitled to place little weight upon bare assertions

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19 [2016] QCA 328 at [36].

20 *Markarian v The Queen* (2005) 228 CLR 357 at 371 [27].

21 *R v Melano; ex parte Attorney-General (Qld)* [1995] 2 Qd R 186; *Lowe v the Queen* (1984) 154 CLR 606 at 612.

of remorse. The voluntary intoxication of Dean, preceding the attack upon the complainant, was not a matter to be considered in mitigation. The sentencing judge did recognise mitigating features in favour of the applicant Dean, in a meaningful way. A parole eligibility date was set in advance of the halfway point of the sentence at 26 months, not 36 months.

The reopening of the sentence in respect of non-declarable presentence custody

[37] In relation to the issue of the 342 days of presentence custody which could not be declared, it is to be observed, as counsel for Dean accepted, that, given the fact of that period had not been put before the sentencing judge, an appropriate course would have been to apply to reopen the sentence. It was explained that, given that the head sentence of six years was contended to be manifestly excessive, it was considered to be a more expedient approach to raise the matter of the non-declarable presentence custody before this Court. That approach may be understood, but it does not follow that there was an appealable error in the exercise of the sentencing judge's discretion, as there was in *Houkamau* where the sentencing judge erred in the approach taken to the period of non-declarable presentence custody that was in fact placed before the Court.

[38] Now that further information concerning the non-declarable period of presentence custody is before this Court, it is appropriate to reopen the sentence to take into account the period of nearly one year spent in presentence custody. The respondent did not quarrel with an approach that gave credit for that period by reducing the head sentence of six years for extortion to one of five years and reducing the custodial component accordingly, with a new parole eligibility date set at 12 November 2017.

[39] As mentioned, that modification arises by way of reopening the sentence and not by way of error requiring the exercise of the sentencing discretion afresh.

Manifestly excessive sentences?

[40] As to the head sentence of six years imposed for extortion, I am unable to accept that it was manifestly excessive. I have already dealt with the comparatives put before the court. None of the authorities put before the Court provided particularly appropriate comparatives. In the circumstances of this case, which concerned coordinated and protracted vigilante style conduct, involving threats and the infliction of actual violence, deterrence featured largely. While a sentence of six years was a heavy one, it could not be said to have been outside the proper sentencing discretion.

The application by Murphy

The factual findings against Murphy

[41] The factual findings made by the sentencing judge which were challenged by Murphy's counsel as having no basis and thus erroneous, concerned:

- that Murphy planned for the involvement of three men,

- that he anticipated that his co-offenders would act together, that is he expected the force of a number of men would be used against the complainant and,

- that his approach was instructive for the hierarchy of the group.

[42] I do not consider the complaints have any substance. At sentence, counsel for Murphy accepted that the sentencing observations complained of were open on the evidence. Counsel conceded that it was open that the unlawful purpose that Murphy was a party to concerned the recovery of money in an improper way by forcing the complainant to perform a task or take his car as payment using the force of a number of people.[22] In any event, as the respondent argued, the observations were a logical inference capable of being drawn from admitted facts. The debt was owed to Murphy and it was Murphy who had reason to pursue the debt. He had attended Ms Davies home and was present with others when threatening demands were made for the complainant's whereabouts. Those others were later involved in the actual violence committed against the complainant, with Murphy arriving at the location at which the complainant had been detained and thereupon proceeding to immediately assault the complainant, whilst he was held by Dean.

[43] In my view, it was open to the sentencing judge to draw an inference about the level of violence within Murphy's contemplation from the nature of his participation at the beginning and the end. As the respondent submitted, Murphy's lack of alarm exhibited when arriving to assault the complainant, the co-ordinated nature of the offence, and the sequential release by Dean, only after the demands had been made by Murphy, leant weight to the inferences drawn and not disputed by his counsel, that the events of 24 March 2014 had been planned. The observations made by the prosecutor that the Crown lacked evidence as to whose plan it was, or who was responsible for the plan, and knew the exact details of the plan for what was to occur, reflected an observation of a lack of direct evidence on the issue and detail of the plan. As the respondent submitted, those observations did not constrain the finding of the factual basis later engaged by the sentencing judge. There is no substance in this complaint.

Parity

[44] It was submitted that the sentence's judge's finding that, on balance, there was "no material distinction between the criminality of Murphy and Dean" was erroneous in that it failed to properly achieve the necessary "differential treatment of persons according to differences between them relevant to the scope, purpose and subject matter of the law".[23] The applicant submitted that the sentencing judge failed to properly distinguish the applicant's peripheral role relative to his co-offenders, giving rise to a justifiable sense of grievance. In advancing that submission, it was said that Murphy's criminality may be identified as his presence with Jaffe and Dean when threats were made to Davies to locate the complainant or his vehicle, at the beginning of the common unlawful purpose of recovering a debt owed by the complainant. As a result of that common unlawful purpose, Murphy was a party to the events from 24 March 2014 relating to Davies telephoning the complainant until the complainant was taken to the tunnel pursuant to the party provisions of the

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22 AB at 80.

23 *Green v The Queen* (2011) 244 CLR 462 at 472-473 per French CJ, Crennan and Kiefel JJ.

Criminal Code. It was submitted that there was no evidence, and the Crown accepted they could not prove, who was responsible for the exact details of the plan. Murphy's direct involvement comprised attending at the tunnel for a short period, punching the complainant six times and making threats. In particular, it was submitted that Murphy's involvement was significantly less than Dean's given that, Dean was present when the threats were originally made to Davies, Dean was with Jaffe when Davies made arrangements to meet the complainant, whereas Murphy was not present or shown to be aware that conduct. It was also submitted that it was Dean who was the main offender (with Sensoy and Jaffe) when the complainant was taken from the service station to the tunnel, who used the ratchet strap to tie the complainant up and assaulted him when he tried to get away and who was present when Jaffe and Sensoy assaulted the complainant. Murphy was not present or shown to be aware of that conduct. Further, Dean continued to be present after the assault on the complainant by Murphy.

[45] Given that I accept that the findings made against Murphy were open to the sentencing judge as already explained, I am unpersuaded that the sentencing judge erred in her assessment as to the relative criminality of Murphy and Dean. Although Dean's presence was greater and his conduct more violent, Murphy's role in planning for the involvement of the others, in circumstances where the unlawful plan involved the detention of the complainant to force him, through threats or violence, to repay the debt or hand over his car or work for Murphy, and the role he played when present, does not leave room for a material distinction as to culpability.

[46] Nor do I consider that there is any justifiable sense of grievance in relation to the respective sentences imposed for the robbery count. Although Dean's conduct was more serious in one sense, it remains that Murphy had a close and significant involvement in the offending.[24]

Were the sentences imposed on Murphy manifestly excessive?

[47] In relation to the contention that the sentences imposed were manifestly excessive, it was submitted that the ground going to the failure to properly take into account matters of mitigation was to be considered as a subsidiary of the complaint that the sentences imposed were manifestly excessive, as no error was suggested as a failure to take a material factor into account. On the basis of my view of the authorities and the comments I have made in relation to the sentences imposed on Dean, I am unable to accept that the sentences imposed on Murphy were manifestly excessive.

[48] Furthermore, the respondent submitted that the sentencing did recognise mitigating features in favour of Murphy, in a meaningful way. A parole eligibility date was set in advance of the half way point of the sentence, at 29 months not 36 months. It cannot be doubted that the sentencing judge was cognisant of the circumstances and timing of the entered plea and it was not submitted that this evidenced remorse. Further, although the described onerous conditions of bail had been breached on a number of occasions, as the respondent submitted, weight was given to the factor of their imposition. Murphy's further offending did not support any significant claim to being of otherwise good character. Although Murphy's counsel suggested that imprisonment had caused financial disruption through financial mismanagement, it was not suggested that any particular financial hardship would

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24 *R v Main and Fauid* [2012] QCA 80 at [61] and [65] and *R v Kitching* [2003] QCA 539 at 6.

be occasioned to his family as a consequence of incarceration. That factor did not claim much weight as a mitigating factor. Moreover, I accept the respondent's submission that there was an advanced date set for parole eligibility which indicated that the sentencing judge did give appropriate weight to relevant mitigating factors, in circumstances where the sentencing judge was also properly focused on deterrence.

Declaration

[49] Counsel for Murphy contended that there was error in the calculation of the declared presentence custody but that appears to have been in Murphy's favour and the matter was not pressed.

The application by Jaffe

Parity

[50] It was submitted on behalf of Jaffe that the conclusion that Jaffe's conduct was merely on "a rung below" the more serious criminality of Dean and Murphy, and commensurate with that of Sensoy, failed to properly achieve the necessary "differential treatment of person according to differences between them relevant to the scope, purpose and subject matter of the law."

[51] Counsel submitted that it was uncontroversial that Jaffe's criminality was the most marginal of the four men as to counts 1 and 2, Jaffe procured Davies to telephone the complainant, and then drove her and the principal offenders to the service station, where he remained for a time. Jaffe did not have any contact with the complainant on arrival, nor was there any allegation that he enabled, encourage or assisted his co-offenders in their dealings with the complainant beyond mere presence. As to the remaining counts, he was not present for the violence perpetrated on the complainant. Nevertheless, Jaffe did return to the tunnel and was involved in punching the complainant and did not intervene when Dean tightened the strap around his mouth. He also stood in the way to prevent any prospect of the complainant escaping.

[52] I cannot accept that the relevant head sentences imposed on Jaffe and Sensoy gave rise to any justifiable sense of grievance on Jaffe's part. Jaffe and Sensoy both received four year sentences for the robbery charge. It was appropriate that the significant mitigating features of Sensoy's youth and much earlier pleas of guilty, reflected in the immediate suspension of the term, were reflected in the sentences imposed on Sensoy.

[53] Sensoy's youth in particular, combined with his greater cooperation in entering an earlier plea, renders the sentences imposed on Sensoy an inappropriate basis for a complaint relating to lack of parity.

Manifestly excessive

[54] While Jaffe's offending did not include extortion, it was, nonetheless, serious offending in company and offending involving his playing a pivotal part in setting a trap for the complainant. Given the characterisation of his offending by the sentencing judge, a sufficiently deterrent sentence was required. I do not consider that there was error in failing to take into account any mitigating factor. Her Honour gave

detailed reasons for her conclusion as to the lack of causative connection between Jaffe's offending and his mental health issues, while accepting some weight was to be given to psychological issues. A consideration of the authorities dealt with, including the vigilante cases, does not demonstrate that the sentences imposed were manifestly excessive.

Orders

[55] I would propose the following orders:

1. In relation to the application by Dean:

   (a) The application is granted to the extent that the sentence on the count of extortion is set aside and in lieu thereof a sentence of five years is imposed and the parole eligibility date of 12 November 2018 is varied to 12 November 2017.

2. The application by Murphy for leave to appeal against sentence is refused.

3. The application by Jaffe for leave to appeal against sentence is refused.

[56] **FLANAGAN J:** I agree with the orders proposed by Philippides JA and with her Honour's reasons.